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7 **UNITED STATES DISTRICT COURT**
8 **DISTRICT OF NEVADA**
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10 UNITED STATES OF AMERICA,

11 Plaintiff,

12 v.

13 FRANCISCO ALBERTO DIAZ-
14 ESPANA,

15 Defendant.
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Case No. 2:09-cr-00127-LDG (PAL)

ORDER

17 The defendant, Francisco Alberto Diaz-Espana, moves for a *nunc pro tunc*
18 amendment of the judgment (#56). The government opposes the motion (#57). As the
19 Court lacks authority to grant the requested relief, the court must deny the motion.

20 The defendant was in state custody when he was indicted and arrested by federal
21 authorities in the instant case. He appeared in this Court pursuant to a writ of habeas
22 corpus *ad prosequendum* and eventually pled guilty. The defendant remained in state
23 custody pending his federal sentencing. Defense counsel represents that, prior to
24 sentencing, she endeavored to have the defendant's federal sentence imposed after he
25 was paroled from his state sentence. Her purpose was to ensure that, at the the time of
26 the federal sentencing, the defendant would be in federal custody, and thus would be

1 placed in a federal facility where he could avail himself of federal programming. In her
2 efforts, defense counsel conferred with state authorities who indicated their belief that the
3 defendant would be paroled from his state sentence prior to July 9, 2010.

4 Prior to the defendant's federal sentencing, state authorities issued a warrant
5 against the defendant on an unrelated criminal offense. The defendant's federal counsel
6 and his state counsel then coordinated his federal and state sentencing, so that the federal
7 sentence would occur first.

8 On July 9, 2010, the Court sentenced the defendant to a term of 37 months. Four
9 days later, the defendant was sentenced in the state case to a term of 12 - 30 months.
10 The state sentencing judge ordered that the state sentence run concurrent with the federal
11 sentence imposed by this Court.

12 Subsequent to the federal and state impositions of sentence, defense counsel
13 learned that the defendant had not been paroled from his first state sentence prior to the
14 imposition of his federal sentence.¹ As such, when the Court sentenced the defendant, he
15 was not in federal custody but was instead in state custody. Further, he remained in state
16 custody on the first state sentence until after the imposition of his sentence on his second
17 state case. As a result, upon completion of the first state sentence, the defendant was not
18 transferred to federal custody to commence his federal sentence, but remained in state
19 custody to begin serving his second state sentence. As the defendant was not transferred
20 to federal custody until the completion of his second state sentence, his federal sentence
21 did not commence until after he completed his state sentence.

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24 ¹ Defense counsel represents that the defendant's state sentence did not
25 expire before July 9, 2010, as originally expected, because state authorities determined
26 (after July 9, 2010) that the defendant was not eligible to receive "work credits" toward his
first state sentence while housed at the North Las Vegas Detention Center. The defendant
had been housed at the North Las Vegas Detention Center, in state custody, while
appearing in federal court pursuant to the writ of habeas corpus ad prosequendum.

1 The defendant now seeks to have this court amend his judgment *nunc pro tunc* to
2 the date his federal sentence was imposed to recommend, to the Bureau of Prisons, that
3 his federal sentence commence on the date that it was imposed. The government
4 opposes the motion because no authority exists for the Court to amend the judgment in a
5 criminal case under these circumstances. Though the defendant seeks only to amend the
6 judgment to include a recommendation to the Bureau of Prisons, the Court agrees with the
7 government that it lacks authority to so amend the judgment.

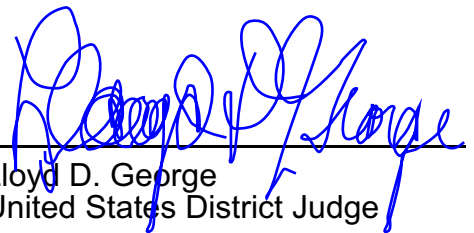
8 “*Nunc pro tunc* amendments are permitted primarily so that errors in the record may
9 be corrected. The power to amend *nunc pro tunc* is a limited one, and may be used only
10 where necessary to correct a clear mistake and prevent injustice.’ It does not imply the
11 ability to alter the substance of that which actually transpired or to backdate events to serve
12 some other purpose.” *United State v. Sumner*, 226 F.3d 1005, 1010 (9th Cir. 2000) (quoting
13 *Martin v. Henley*, 452 F.2d 295, 299 (9th Cir.1971). The requested amendment to the
14 judgment does not seek to correct an error in the record, but to alter the substance of what
15 occurred. The judgment, as it presently stands, is not an erroneous record of the sentence
16 imposed by this court. A *nunc pro tunc* amendment of that judgment, even to include only
17 a recommendation, would be an alteration of the substance of what occurred. Accordingly,
18 the Court must deny the motion.

19 The Court would note that, while it cannot amend the judgment, the Court can make
20 a current recommendation to the Bureau of Prisons that it make a *nunc pro tunc*
21 designation of the defendant to a state prison. Accordingly, the Court recommends that the
22 Bureau of Prisons designate *nunc pro tunc* the defendant for service of the federal
23 sentence imposed in this matter to a non-federal facility, and that this *nunc pro tunc*
24 designation be effective to July 9, 2010, or to a suitable date thereafter on which the
25 defendant was in custody in a non-federal facility appropriate and suitable to the Bureau of
26 Prisons.

1 Therefore, as this court lacks authority to grant Defendant's motion to amend the
2 judgment *nunc pro tunc* under these circumstances,

3 THE COURT **ORDERS** that Defendant's Motion for *Nunc Pro Tunc* Amendment of
4 Judgment (#56) is DENIED.

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6 DATED this 4 day of January, 2012.


Lloyd D. George
United States District Judge